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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO ARANA,

Defendant and Appellant.

2d Crim. No. B203628
(Super. Ct. No. 2006015946)
(Ventura County)

Pedro Arana appeals the judgment following his conviction for kidnapping to commit robbery (Pen. Code, § 209, subd. (b)(1)),¹ and second degree robbery (§ 211). The jury found he personally used a handgun in the offenses. Arana contends there was insufficient evidence to support the aggravated kidnapping conviction. He also claims instructional error, and error in ordering Arana to pay attorney fees and the cost of a probation department investigation. We will reverse the attorney fee order. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

Juan Murillo was working alone at a Cyber Copy store. At approximately 10:00 p.m., he closed the store and left the premises through a back door that led to a parking lot for several stores. After Murillo closed the door, Arana approached and

¹ All statutory references are to the Penal Code.

ordered Murillo to go back inside the store. Murillo felt what he thought was a handgun against his back. Murillo also saw other people in the vicinity. When Arana and Murillo entered the store, Murillo turned on the lights and saw that Arana was holding a revolver. Murillo deactivated the alarm, fearing he would be shot if the alarm sounded. Murillo also worried that Arana might be under the influence of drugs or alcohol. The burglar alarm was 61 feet from the back door.

Arana told Murillo that his sister was a customer of the store and Murillo recognized her name as an employee of an important customer. Arana told Murillo that, if Murillo gave him \$200, his sister would repay the money. When Murillo showed Arana an empty wallet, Arana told him there were seven men outside with weapons who wanted to come in and steal everything but would stay outside if Murillo gave him \$1,000. Murillo said he had only \$40 in cash on the premises but, out of fear, suggested Arana steal a computer tower instead. Arana took the computer tower, threatened Murillo about calling the police, and left. Murillo then called his boss who called the police.

The police used his sister's name to locate and arrest Arana. Arana told police that he went to the Cyber Copy store because Murillo had tried to "hit up" Arana's sister, and Arana wanted Murillo to stop. Arana also told police that he accused Murillo of overcharging his sister, and that Murillo gave Arana a computer to keep "everything cool."

Arana was charged with making criminal threats (§ 422), kidnapping to commit robbery, and robbery. As to the criminal threat count, it was alleged that he had a prior serious felony conviction. (§ 667, subd. (a).) As to the aggravated kidnapping and robbery counts, it was alleged that Arana personally used a handgun (§§ 12022.5, subd. (a), 12022.53, subd. (b)), and had a prior strike conviction (§§ 667, subds. (c)(1) & (e)(1), 1170.12, subds. (a)(1) & (c)(1)).

Arana pleaded guilty to the criminal threat offense, and was convicted by a jury of the aggravated kidnapping and robbery offenses.² Arana admitted the prior strike conviction. The trial court struck the strike conviction as to the kidnapping count, and struck the firearm enhancement as to the robbery count. Arana was sentenced to a prison term of 19 years plus 7 years to life. The sentence consisted of two years for the criminal threat doubled as a second strike, plus 10 years for the firearm enhancement, five years for the prior conviction (§ 667, subd. (a)), and seven years to life for the kidnapping. The court imposed three years doubled as a second strike for the robbery which it stayed pursuant to section 654. The court ordered Arana to pay the cost of the probation investigation, and the attorney fees of his public defender.

DISCUSSION

Substantial Evidence Supports Aggravated Kidnapping Conviction

Arana contends there was insufficient evidence to support the conviction for aggravated kidnapping. He claims movement of victim Murillo was incidental to the commission of robbery and did not increase Murillo's risk of harm. In determining the sufficiency of the evidence to support a conviction, we view the record in the light most favorable to the judgment and draw all reasonable inferences to support it. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) We will uphold a conviction if any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Ibid.*) In this case, substantial evidence supports the conviction.

Aggravated kidnapping is the kidnapping or carrying away of another person with the intent to commit robbery or certain sex crimes. (§ 209, subd. (b)(1).) Aggravated kidnapping "requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself." (*People v. Martinez* (1999) 20 Cal.4th 225, 232; *People v. Rayford*, *supra*, 9 Cal.4th at p. 12; § 209, subd. (b)(2).) These two requirements are separate, but interrelated, and are determined

² The convictions occurred after a second jury trial. The first trial ended in a mistrial.

by consideration of the totality of the circumstances in a qualitative rather than quantitative evaluation. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.)

In deciding whether movement is merely incidental to the underlying crime, a jury must consider the scope and nature of the movement and the environment in which the movement occurred. The actual distance is significant, but there is no minimum number of feet a victim must be moved. (*People v. Rayford, supra*, 9 Cal.4th at p. 12; see, e.g., *People v. Jones* (1999) 75 Cal.App.4th 616, 629 [moving victim 40 feet across a parking lot to her car sufficient]; *People v. Corcoran* (2006) 143 Cal.App.4th 272 [moving victims 10 feet at gunpoint within a building sufficient]; *People v. James* (2007) 148 Cal.App.4th 446, 449 [moving victim at gunpoint from outside into a building sufficient]; *People v. Washington* (2005) 127 Cal.App.4th 290, 299 [moving victim 15 feet from teller area to bank vault incidental to robbery and insufficient].) Here, Arana moved Murillo at gunpoint from outside his store into the store, and in so doing, removed the victim from the relative safety of a parking lot where he could be seen by others into the privacy of the building. The movement was a short distance but, by changing the environment, its scope and nature were significant. Where a defendant takes a victim to another place, especially to a more isolated area less visible to the public, the jury may reasonably infer that the movement was not merely incidental to the underlying crime. (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169; *People v. Diaz* (2000) 78 Cal.App.4th 243, 248-249.)

The second requirement and "essence of aggravated kidnapping" is that the forced movement must subject the victim to a substantial increase in the risk of harm above and beyond that inherent in the underlying offense. (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152.) Courts have repeatedly stated that the key factors in determining the increase in risk of harm are whether the movement decreased the likelihood of detection, increased the danger created by any efforts by the victim to escape, and provided the defendant an enhanced opportunity to commit additional crimes. (*Ibid.*; see also *People v. Martinez, supra*, 20 Cal.4th at p. 237; *People v. Rayford, supra*, 9 Cal.4th at p. 13.)

Here, there is substantial evidence that the forced movement of Murillo substantially increased his risk of harm. Murillo had left the store building, and the robbery could have occurred in the parking lot. Instead, Arana then forced him at gunpoint to reopen the store and go back inside which was a private and secluded location and where Murillo became more vulnerable. A jury could reasonably have concluded that this movement decreased the likelihood of detection, increased the risk of injury if the victim tried to escape or otherwise resisted, and gave Arana a greater opportunity to commit additional crimes. (See *People v. Jones*, *supra*, 75 Cal.App.4th at pp. 629-630; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594.)

No Instructional Error

1. *Instruction on Simple Kidnapping*

Arana contends the trial court erred by refusing to instruct the jury on simple kidnapping as a lesser included offense of aggravated kidnapping. (§ 207, subd. (a); see CALCRIM No. 1215.) We disagree.

Simple kidnapping is a lesser included offense of aggravated kidnapping. (*People v. Jackson* (1998) 66 Cal.App.4th 182, 189.) It requires moving a person from one place to another against his or her will by the use of force or fear. (*People v. Majors* (2004) 33 Cal.4th 321, 326-327; § 207, subd. (a).) Aggravated kidnapping, as relevant to this case, adds an additional requirement that the defendant intends to commit robbery at the time of the kidnapping. (*People v. Dominguez*, *supra*, 39 Cal.4th at p. 1152.)

A court has a sua sponte duty to instruct the jury on lesser included offenses when there is substantial evidence from which a reasonable jury could conclude that the defendant, if guilty at all, was guilty of the lesser offense but not the charged offense. (*People v. Parson* (2008) 44 Cal.4th 332, 348-349; *People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 162.) Minimal and insubstantial evidence, however, is not sufficient to require an instruction. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.)

Moreover, where a defendant denies any complicity in the crime charged, and lays no foundation for a verdict intermediate between "not guilty" and "guilty as charged," it is error to instruct on a lesser offense. (*People v. Trimble* (1993) 16

Cal.App.4th 1255, 1260; see also *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1019-1020 and cases cited therein.) Here, the People's evidence showed that Arana forced Murillo into his store and robbed him at gunpoint. Arana's defense was that his encounter with Murillo was a consensual discussion concerning inappropriate behavior by Murillo towards Arana's sister. If his story was believed, he was not guilty of anything. Arana denied having a gun, denied forcing Murillo into the store, and claimed Murillo gave him the computer tower as some kind of good will gesture. Under no view of the evidence was Arana guilty of only simple kidnapping. The only basis for a simple kidnapping verdict would have been the jury's unexplainable rejection of all of the prosecution evidence. There is no duty to instruction on a lesser included offense under such circumstances. (*People v. Abilez* (2007) 41 Cal.4th 472, 514.)

Also, the evidence supporting the verdict is strong. There is no reasonable probability Arana would have obtained a more favorable result had the trial court given instructions on lesser included offenses. Any error in failing to give those instructions is harmless. (*People v. Flood* (1998) 18 Cal.4th 470, 490.)

2. No Error re Pinpoint Instructions

Arana contends that the trial court erred by instructing the jury with two "pinpoint" instructions offered by the People that improperly pointed to specific evidence favorable to the prosecution. We disagree.

A trial court has a duty to instruct the jury on general legal principles relevant to the issues that are supported by substantial evidence, as well as a duty to help the jury understand the legal principles the jury is asked to apply. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530; *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Generally, trial courts rely on standard form jury instructions, but a party may request further instructions to amplify, clarify or explain the party's theory of the case. (*People v. Estrada* (1995) 11 Cal.4th 568, 579; *People v. Talamantes* (1992) 11 Cal.App.4th 968, 974-975; *People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

A so-called "pinpoint" instruction which relates particular facts to a legal issue in the case or an evidentiary theory of a party is an acceptable means of providing

explanatory information to the jury. (*People v. Flores* (2007) 157 Cal.App.4th 216, 220.) An instruction that pinpoints specific evidence rather than a legal issue or theory, however, is impermissible. Such an instruction is deemed argumentative because it directs the jury to specific evidence and invites inferences on a disputed question of fact favorable to one party. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1225; *People v. Wright* (1988) 45 Cal.3d 1126, 1135.)

Here, the trial court instructed the jury with two special instructions proposed by the People regarding aggravated kidnapping. As previously stated, it is well established that aggravated kidnapping requires movement more than incidental to the underlying crime and that substantially increases the risk of harm to the victim. (*People v. Rayford, supra*, 9 Cal.4th at p. 12; § 209, subd. (b)(2).) The special instructions given by the court amplified and explained these elements of the charged offense without pinpointing specific evidence or inviting inferences favorable to the prosecution.

The first special instruction clarified and amplified the statutory requirement that forced movement must increase the risk of harm by stating the factors relevant to making that determination, namely, whether the movement decreased the likelihood of detection, increased the danger of an attempt to escape, or provided the defendant an enhanced opportunity to commit additional crimes. These factors have been set forth in several Supreme Court and appellate court cases and have become well-established law. (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152; *People v. Martinez, supra*, 20 Cal.4th at p. 232; *People v. Rayford, supra*, 9 Cal.4th at p. 12.) The second instruction clarified and amplified the statutory requirement that forced movement must be more than incidental to the robbery by reciting equally-established law that the jury must consider the scope, nature, and context of the movement. (See *Dominguez*, at pp. 1151-1152.)

Reimbursement of Attorney Fees and Cost of Investigation

1. Trial Court Erred in Ordering Reimbursement of Attorney Fees

Arana contends that the trial court erred in ordering him to pay \$8,000 to the public defender as attorney fees. He argues that he was not given notice or a hearing

to determine his financial ability to pay those amounts, and that the orders were not supported by substantial evidence. We agree in part.

After a noticed hearing, a defendant with the financial ability to pay may be ordered to reimburse the county for "all or a portion of the cost" of a court-appointed attorney. (§ 987.8, subd. (b); *People v. Smith* (2000) 81 Cal.App.4th 630, 637.) There is a presumption that a defendant lacks such financial ability. "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (§ 987.8, subd. (g)(2)(B); *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.)

Arana argues, and the People concede, that the record fails to show Arana received notice that he might be required to pay attorney fees, or any hearing to determine his ability to pay. At the sentencing hearing, the trial court ruled that Arana had the financial ability to pay, but no portion of that hearing was dedicated to an ascertainment or discussion of his financial condition or ability to pay. The court's determination was based on Arana's refusal to provide complete financial information or otherwise cooperate with the probation department.

The disputed issue on appeal concerns whether the matter should be remanded to the trial court for a noticed hearing. Arana argues that, because there was no substantial evidence that Arana had the financial ability to pay, the attorney fee order should be reversed without a remand. Respondent requests a remand to give the People an opportunity to present evidence to establish Arana's ability to pay at least some portion of the attorney fees. We agree with Arana.

Although there was no noticed hearing on the subject, the record shows a total inability to pay any portion of the ordered attorney fees. The portion of the financial statement filled out by Arana stated that he was not employed and had no assets whatsoever. Respondent provides no indication that any potential source of assets could be proven, or that there is any meaningful possibility that Arana had the ability to pay the attorney fees.

In *People v. Flores* (2003) 30 Cal.4th 1059, 1068-1069, the Supreme Court remanded the case for the trial court to "make an informed decision" regarding ability to pay, and observed that a defendant might be able to pay a portion of the amount ordered by the court even if not the entire amount. But, in *Flores* a showing of unusual circumstances was possible based on evidence that the defendant was "stable and employed" and had personal property assets and, therefore, might be able to pay a portion of the fees. (*Ibid.*) There is no hint in the instant record that Arana had any ability to pay any portion of the attorney fee award.

2. No Error in Ordering Payment of Probation-Related Costs

Arana also contends that the trial court erred in ordering him to pay \$1,740 for the cost of an investigation by the probation department. He does not dispute notice, but argues that the order was not supported by substantial evidence. We disagree, and conclude that Arana has waived any right to raise this issue for the first time on appeal.

Section 1203.1b, subdivision (a), provides that, in any case where a convicted defendant is the subject of a presentence investigation and report, the probation officer must determine the defendant's ability to pay the costs thereof. (§ 1203.1b, subd. (a).) If the probation officer determines that the defendant has the ability to pay all or some of the costs, the probation officer must inform the defendant that he or she is entitled to a hearing at which the trial court must make a determination of his or her ability to pay and the payment amount. (*Ibid.*) "The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (*Ibid.*)

Notwithstanding the "knowing and intelligent waiver" language in the statute, it has been held that a defendant's failure to object forfeits the claim on appeal. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1068.) The purpose of section 1203.1b is to impose the costs arising from criminal acts to convicted defendants and replenish public funds from those who have directly benefited from county expenditures. (*People v. Bradus* (2007) 149 Cal.App.4th 636, 643.) Such purpose would be undermined if

convicted defendants were allowed to stand silently by, and raise the issue for the first time on appeal. (*Valtakis*, at p. 1076.)

Here, Arana had a full and fair opportunity to object to payment of the probation report costs, but did not do so. In addition, he affirmatively refused to cooperate with the probation department in a determination of his ability to pay the costs. Based on these facts, the trial court could reasonably infer that Arana was not contesting its findings on ability to pay. He has forfeited his claim on appeal.

DISPOSITION

We strike the trial court's award of attorney fees pursuant to section 987.8, subdivision (b). Otherwise, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Patricia M. Murphy, Judge
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